(3)

Supreme Court, U.S.
FILED
NOV 10 1993
OFFICE OF THE CLERK

No. 93-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL S. HEFTER
Counsel of Record
MAUREEN A. GORMAN
CAROLINE K. VICKREY
HEFTER & RADKE
333 West Wacker Drive
Suite 2810
Chicago, Illinois 60606
(312) 444-9292
Counsel for Respondent

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

45 pp

QUESTIONS PRESENTED

Respondent Altheimer & Gray objects to each of the Petitioner's "Questions Presented." Altheimer & Gray submits the following Questions:

A tribal corporate entity entered into a contract with a third party to engage in manufacturing and marketing medical latex products in an existing facility on Indian land. The contract provided that the tribal entity would pay for the third party's attorneys fees if the deal fell through. During the negotiations and in the contract, the tribe and the tribal entity expressly and in writing agreed to waive exhaustion and sovereign immunity and agreed to submit to the jurisdiction of the federal and state courts in Illinois. The tribe and the tribal entity also expressly waived exhaustion and sovereign immunity in the tribe's Law and Order Code and the entity's Charter. In the contract, neither the tribe nor the tribal entity ceded any right, interest or control in Indian land to a non-Indian. The questions presented are as follows:

1. Is the tribal exhaustion rule applicable to this case?

2. Are the tribe's and the tribal entity's waivers of sovereign immunity effective?

3. Is the contract one for services "relative to [Indian] lands" within the meaning of 25 U.S.C. §81?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND OTHER LAWS INVOLVED	2
STATEMENT OF THE CASE	2
A. Nature Of The Controversy	2
B. The Proceedings Below	6
REASONS FOR DENYING THE WRIT OF CERTIORARI	7
I. THE HOLDING OF THE SEVENTH CIRCUIT AND THE DISTRICT COURT THAT THE EXHAUSTION RULE IS INAPPLICABLE TO THIS CASE IS CONSISTENT WITH DECISIONS OF THE SUPREME COURT AND OF THE CIRCUIT COURTS OF APPEALS	7
II. THE SOVEREIGN IMMUNITY ISSUE PROVIDES NO GROUNDS FOR GRANTING SMC'S PETITION	13
III. SMC HAS PRESENTED NO GROUNDS FOR REVIEWING THE SEVENTH CIRCUIT'S RULING THAT THE CONTRACT IS NOT SUBJECT TO THE REQUIREMENTS OF 25 U.S.C. §81	17

A. Introduction 17

B. The Seventh Circuit's Decision Is Consistent With Existing Caselaw 18

C. The Decision Below Is Correct On The Merits 21

D. The Historical Context And Legislative History Support The Seventh Circuit's Decision 22

IV.

A CONTRARY RESULT WILL SIGNIFICANTLY IMPAIR INDIAN ECONOMIC INDEPENDENCE AS WELL AS OPEN THE FEDERAL COURTS TO A BARRAGE OF LAWSUITS ... 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases	PAGE
Ables v. United States, 2 Cl. Ct. 494 (1983), *aff'd without op.*, 732 F.2d 166 (Fed. Cir. 1984)	16
Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803 (7th Cir. 1983)	*passim*
Braxton v. United States, 111 S. Ct. 1854, 114 L.Ed. 2d 385 (1991)	7, 17
Costo v. United States, 922 F.2d 302 (6th Cir. 1990)	14
Dean v. Dean, 837 F.2d 1267 (5th Cir. 1988)	13
Granberry v. Greer, 481 U.S. 129 (1987)	12
Green v. Menominee Tribe, 233 U.S. 558 (1914)	17, 18, 19, 21
Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987)	8
Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975)	15
National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)	8, 10
Ross v. Moffitt, 417 U.S. 600 (1974)	14
Snowbird Construction Co. v. United States, 666 F. Supp. 1437 (D. Idaho 1987)	15
Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992)	9, 10, 11
United States ex rel. Buxbom v. Naegele Outdoor Advertising Co. of California, Inc., 739 F.2d 473 (9th Cir. 1984)	26

In re United States ex rel. Hall, 825 F. Supp. 1422 (D. Minn. 1993) 19, 26, 27

United States ex rel. Kishell v. Turtle Mountain Housing Authority, 816 F.2d 1273 (8th Cir. 1987) 10, 11

United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992) 8, 11

Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986) ... 15

Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (7th Cir. 1985) 23, 28

Statutes

25 U.S.C. §81 ..... *passim*

28 U.S.C. §1332 2

Legislative History Materials

Cong. Globe, 41st Cong., 3d Sess. 1483-87 (1871) . 23, 24

Devils Lake Sioux Tribal Law and Order Code

Law and Order Code §2-2-103(3) 12, 16

Law and Order Code §2-2-104 12

Law and Order Code §10-4-106(1) 14, 15

Other Authorities

F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 21, 22, 23

No. 93-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SIOUX MANUFACTURING CORPORATION,

Petitioner,

v.

ALTHEIMER & GRAY,
a partnership,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Altheimer & Gray ("Altheimer") respectfully requests this Court to deny Sioux Manufacturing Corporation's petition for writ of certiorari ("Petition").

OPINIONS BELOW

Altheimer agrees with Petitioner Sioux Manufacturing Corporation's ("SMC") citations of the opinions and judgments delivered in the courts below.

JURISDICTION

Altheimer agrees with SMC's statement of the grounds on which the jurisdiction of this Court is involved.

STATUTES AND OTHER LAWS INVOLVED

Altheimer strongly disagrees with SMC's statement that this case involves 28 U.S.C. §1332. Jurisdiction in the District Court was founded on 28 U.S.C. §1332 because the parties are of diverse citizenship. However, the merits of this case do not involve the diversity statute. Moreover, Altheimer strongly disagrees with SMC's argumentative statement that "[t]his case concerns the use of federal diversity jurisdiction under 28 U.S.C. §1332 (1988) to impair Indian tribal sovereignty." SMC Petition for Writ of Certiorari 2 ("Pet."). This statement not only mischaracterizes the issues in the case, but it is inappropriately argumentative.

Altheimer agrees with the remainder of SMC's statement of the statutes and other laws involved, except to point out that SMC inappropriately characterizes 25 U.S.C. §81 as the "protective provisions of 25 U.S.C. §81" (Pet. 2). The statute speaks for itself.

STATEMENT OF THE CASE

A. Nature of the Controversy.

Altheimer objects to numerous misstatements made by SMC in its presentation of the Nature of the Controversy. Altheimer will first present its statement of the Nature of the Controversy, and then will address specifically the misstatements made by SMC.

In this federal diversity breach of contract action, Altheimer seeks recovery of its attorneys' fees from SMC pursuant to an express provision in the contract at issue in this case. The contract, which was a Letter of Intent agreement (hereinafter "Contract"), was between SMC and a third party, Medical Supplies & Technology, Inc., whom Altheimer represented in negotiating the Contract.

The following facts concerning the negotiations and the Contract are undisputed.

The Devils Lake Sioux Tribe ("Tribe"), a federally recognized Indian tribe, created Sioux Manufacturing Corporation ("SMC") to manufacture and market camouflage cloth and military helmets. *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 806 (7th Cir. 1983), Pet. App. 2. SMC is a wholly-owned tribal corporation and governmental subdivision of the Sioux, organized under the Tribe's Law and Order Code. *Id.* The corporation's offices and sole manufacturing facility are located inside the boundaries of the Devils Lake Sioux Reservation ("Reservation") in Fort Totten, North Dakota, on land which SMC leases from the Tribe. *Id.*

SMC is a large, sophisticated corporation, with gross sales in 1990 totalling approximately $25 million. Sioux Manufacturing Corporation's Statement of Undisputed Material Facts ¶15, Respondent's Appendix 2 ("Resp. App.").

Seeking to expand their business, the Tribe and SMC negotiated with Medical Supplies & Technology, Inc., an Illinois corporation, to manufacture and market latex medical products at the existing Reservation plant. *Altheimer & Gray*, 983 F.2d at 806, Pet. App. 3. In these negotiations, both sides were represented by Chicago attorneys. Affidavit of Martha Mahan Haines ¶¶2, 4, Exhibit A to Altheimer & Gray's Memorandum in Opposition to SMC's

Motion to Dismiss ("Haines Aff."), Resp. App. 4. The Contract was negotiated in a series of in-person meetings in Chicago, Illinois and in telephone conversations, and was executed in Chicago; representatives of SMC and an attorney for SMC were present at each meeting. Haines Aff. ¶¶3-10, 12, Resp. App. 4-7. During the negotiations, representatives of and the attorney for SMC represented and agreed that federal government approval of the Contract was not necessary, that SMC was amenable to suit in the state or federal courts in Illinois rather than in the tribal court, and that sovereign immunity was not a bar to suit. Haines Aff. ¶11, Resp. App. 5-6. These agreements were included in the Contract. *Id.*

The Contract also provided at paragraph 13 that if the transaction contemplated under the Contract were not consummated within 60 days of the date of execution, the Tribe "shall promptly pay, upon demand, all reasonable legal and accounting fees" incurred by Medical Supplies & Technology, Inc. in connection with the negotiation of the Contract. Pet. App. 64-65. However, when the deal between SMC and Medical Supplies & Technology, Inc. did not go through and Altheimer attempted to enforce the Contract, SMC refused to pay Altheimer's fees. This lawsuit followed.

SMC's presentation of the Nature of the Controversy misstates the facts or omits material facts in the following ways.

SMC states: "This is a diversity suit in which a law firm employed by a third party seeks recovery of its legal fees, in the first instance in the federal court, from an on-reservation corporation wholly owned by an Indian tribe." Pet. 2. While this statement is technically correct, it omits two important facts: first, Altheimer seeks recovery of its fees pursuant to an express contractual pro-

vision, and second, Altheimer brought this action in federal court "in the first instance" because SMC expressly agreed in the Contract to submit to the jurisdiction and venue of federal and state courts in Illinois.

In addition, SMC has seriously mischaracterized the Contract at issue. SMC states that the Contract "provided for the establishment, construction, development, and operation of a manufacturing facility in the Tribe's trust land within the Reservation to reduce tribal unemployment." Pet. 3. This statement strongly implies that the Contract provided for constructing an entirely new manufacturing facility on Indian land; the obvious purpose of the statement is to attempt to tie the Contract to Indian land. In reality, it is undisputed that the manufacturing facility *already existed* on Reservation land. Sioux Manufacturing Corporation's Statement of Undisputed Material Facts ¶5, Resp. App. 2 ("SMC operates only one manufacturing facility which is situated in Fort Totten, on Reservation land held in trust for the Tribe by the United States," citing Affidavit of Carl McKay); *see also Altheimer & Gray*, 983 F.2d at 811, Pet. App. 14 (noting that although the manufacturing operation would be located on the Reservation, "the facility was already in existence, was part of the Tribe's ongoing business, and was wholly owned by the Tribe.").

Moreover, although the Contract calls for "architectural and engineering drawings and specifications for the building in which the Product will be produced," there is no evidence in the record as to the subject matter of such drawings and specifications. SMC implies in its Petition that the drawings and specifications were for a new building, and that is wrong. There is no evidence as to what the drawings were for (they could have been, for example, drawings of equipment), and there is direct evidence, submitted *by SMC* that the facility already existed. *Id.*

In addition, SMC sets out various provisions of the Contract, but it omits paragraph 9, which is crucial to a determination of the issues here, as both the district court and Court of Appeals found. Paragraph 9 of the Contract provides as follows:

> 9. Sovereign Immunity. Buyer [SMC] and the Fort Totten Tribe of the Sioux Nation (the "Tribe") will waive all sovereign immunity in regards to all contractual disputes. This agreement and all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois. The Buyer [SMC], the Seller [Medical Supplies & Technology, Inc.] and the Tribe agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois and agree to be bound by final and unappealable judgments rendered by such courts.

Letter of Intent ¶9, Pet. App. 62-63.

SMC also omits the undisputed facts (which are pointed out above) that the forum selection, waiver of sovereign immunity, waiver of exhaustion, and choice of law provisions set out in paragraph 9 of the Contract were all the subject of negotiations between the parties. Haines Aff. ¶11, Resp. App. 5-6. SMC also omits the fact that SMC represented that approval of the Contract from the Bureau of Indian Affairs was not necessary. *Id.*

B. The Proceedings Below.

Altheimer strongly objects to SMC's statement that the Seventh Circuit "[d]isregard[ed] the plain language of section 81" (Pet. 6) in reaching its holding that the Contract is not covered by 25 U.S.C. §81.

Altheimer also objects to SMC's summary of the Seventh Circuit's ruling on the sovereign immunity issue. SMC

states that the Seventh Circuit "interpreted and applied various tribal ordinances." Pet. 6. As explained in more detail below, the Tribe's Law and Order Code and the SMC Charter so clearly and unambiguously waive sovereign immunity that there is nothing to "interpret."

REASONS FOR DENYING THE WRIT OF CERTIORARI

This case presents no important questions deserving this Court's review, nor does it present any frequently recurring questions, as evidenced by the fact that SMC has not cited to one decision with facts remotely similar to the facts of this case. Most importantly, there is no conflict between the Seventh Circuit's decision in this case and the decisions of other Circuit Courts of Appeal or of this Court. *See Braxton v. United States*, 111 S. Ct. 1854, 1857, 114 L.Ed. 2d 385 (1991) (a principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law). Finally, SMC has misstated both the law and the facts. For these reasons, the petition for writ of certiorari should be denied.

I.

THE HOLDING OF THE SEVENTH CIRCUIT AND THE DISTRICT COURT THAT THE EXHAUSTION RULE IS INAPPLICABLE TO THIS CASE IS CONSISTENT WITH DECISIONS OF THE SUPREME COURT AND OF THE CIRCUIT COURTS OF APPEALS.

In its thorough discussion of the tribal exhaustion issue, the Seventh Circuit carefully analyzed the leading cases and affirmed the district court's ruling that the exhaus-

tion rule is not applicable to this case. *Altheimer & Gray*, 983 F.2d at 812-15, Pet. App. 16-21.[1] The court reasoned, first, that there has been no attack on the tribal court's jurisdiction, there is no case pending in a tribal court, and the dispute principally concerns state and federal law, not tribal law. 983 F.2d at 814, Pet. App. 20. "More importantly," the Seventh Circuit continued, "application of the tribal exhaustion rule would not serve the policies articulated in *Iowa Mutual* [*Insurance Co. v. LaPlante*, 480 U.S. 9 (1987)] and *National Farmers* [*Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)]." 983 F.2d at 814-15; Pet. App. 20. The Seventh Circuit explained that in those two leading cases, this Court was concerned with implementing Congress's policy of tribal self-government. 983 F.2d at 815, Pet. App. 20. *Id.* In contrast, the Seventh Circuit found that in this case, "the tribal entity wished to avoid characterization of the contract as a reservation affair by actively seeking the federal forum," as evidenced by its express agreement in paragraph 9 of the Contract to submit to the venue and jurisdiction of federal and state courts located in Illinois. *Id.*[2]

Indeed, not only SMC, but also the Tribe itself, expressly selected the federal forum. The Tribal Council, the governing body of the Tribe, enacted the SMC Charter by resolution.[3] In Paragraph 4.2.2 of the Charter, the Tribe and

---

[1] A district court's ruling on this issue is subject to the abuse of discretion standard. *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992).

[2] See Letter of Intent ¶9, Pet. App. 62-63, and reproduced above in Statement of the Case.

[3] Devils Lake Sioux Tribe Resolution No. A05-89-191, Resp. App. 8-9. (The Resolution was attached to Articles of Incorporation of the Sioux Manufacturing Corporation, portions of which are reproduced at Pet. App. 53-55.)

SMC expressly waived exhaustion "with regard to any written contract entered into by the Corporation [SMC]." Articles of Incorporation ¶4.2.2, Pet. App. 53. Pursuant to that grant of authority, SMC waived exhaustion in paragraph 9 of the Contract.

Because the Tribe and SMC "actively [sought] the federal forum" (*Altheimer*, 983 F.2d at 815, Pet. App. 20), the Seventh Circuit concluded that "[t]o refuse enforcement of this routine contract provision [the forum selection clause] would be to undercut the Tribe's self-government and self-determination." *Id.* In short, for the reasons explained by the Seventh Circuit, its ruling on exhaustion affirming the district court's ruling is fully consistent with the leading Supreme Court cases.

The Seventh Circuit's decision is also consistent with the decisions of other Circuit Courts of Appeals. SMC essentially argues that the Seventh Circuit addressed the issues before it in the wrong order. SMC says that the Eighth and Ninth Circuits "hold" that the sovereign immunity issue should be addressed before the exhaustion issue (Pet. 10-11), but the cases SMC cites in support say nothing of the sort.

SMC quotes *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) completely out of context. SMC says that *Stock West* held that "because issues surrounding a claim of tribal sovereign immunity would 'require a careful study of the application of tribal laws and tribal court decisions,' a federal diversity court should stay its hand until after the tribal court has an 'opportunity to resolve the question.' " Pet. 11, *citing Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992). What SMC omits is that in *Stock West*, the district court ruled, and the appellate court affirmed, that the district court would

stay its hand and dismiss the suit as a matter of comity, to allow the tribal court to address the issue of whether the tribal court possessed concurrent jurisdiction over the case.[4] Despite this ruling, the district court went on to rule, as an alternative ground for dismissal of the action, that defendant was immune from suit. *Id.* at 920. The Ninth Circuit held that the latter ruling was an abuse of discretion; since the case was being dismissed and would be heard by the tribal court, the district court should not have ruled on the merits of the immunity issue. *Stock West*, 964 F.2d at 920. Thus *Stock West* stands only for the unremarkable proposition that where an action is dismissed as a matter of comity, the court should not proceed to make substantive rulings in the case, but should allow the other tribunal to do so.

Similarly, the Eighth Circuit case cited by SMC, *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273, 1277 n.3 (8th Cir. 1987), does not stand for the proposition cited. In the first place, SMC cites to a supposed "holding" in a footnote, but courts generally do not put their holdings in footnotes. More importantly, the action in *Kishell* was dismissed for lack of subject matter jurisdiction, and it was for that reason that both the district court and appellate court declined to address the immunity question. *Id.* No citation is needed (and the

---

[4] In *Stock West*, as in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 485 (1985), there was a substantial question concerning whether the tribal court possessed jurisdiction over the matter. *Stock West*, 964 F.2d at 920, 919 citing *National Farmers*, 471 U.S. at 854-57. In those circumstances, exhaustion was required. In contrast, in this case, as the Seventh Circuit found, there has been no direct attack on a tribal court's jurisdiction and for that reason, among several others, exhaustion was not required. *Altheimer & Gray*, 983 F.2d at 814, Pet. App. 20.

court in *Kishell* cited none) for the proposition that where a federal court lacks subject matter jurisdiction, the court will not address any other issues raised by the parties. *See id.* In short, neither *Stock West* nor *Kishell* is at all analogous to this case. SMC's claim, then, that a conflict exists between those decisions and the Seventh Circuit's decision is meritless.

SMC again misstates the law when it asserts (Pet. 11-12) that the Seventh Circuit erred by addressing the issue of the validity of the contract under 25 U.S.C. §81 (hereinafter "Section 81") prior to addressing exhaustion. No case so holds. In support, SMC cites *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992), which SMC states "held that where federal law does not give the federal court exclusive jurisdiction, the principle of judicial self-restraint regarding activities occurring inside the reservation is so strong that the federal court should abstain from considering the merits of a dispute, even where the federal government seeks to enforce federal law." Pet. 11-12.

SMC completely mischaracterizes *Plainbull*. In the first place, *Plainbull* had nothing to do with Section 81, thus it can hardly support SMC's contention that a court must address Section 81 in a particular order. In addition, the Ninth Circuit in *Plainbull* said nothing about "judicial self-restraint" or anything else that SMC says the case said. In *Plainbull*, the Ninth Circuit held that the case belonged in tribal court where a tribal member was accused of grazing cattle on tribal land without tribal permission. *Id.* at 728. In those circumstances, the court merely observed that the fact that the government was seeking to enforce a federal law was immaterial. *Id.*

In short, there is simply no case that holds that courts must address the issues of exhaustion, immunity or the validity of a contract under Section 81 in a particular order. Therefore, SMC's assertion that there is a conflict between the Seventh Circuit and other Courts of Appeals is specious.

In addition to the misstatements identified above, SMC makes the following misstatements of both fact and law in its discussion of the exhaustion issue. As for the law, SMC cites and quotes a United States Supreme Court case as establishing "the doctrine of exhaustion of tribal remedies" as "a bright line 'inflexible bar to [the] consideration of the merits' of a dispute." Pet. 8, quoting *Granberry v. Greer*, 481 U.S. 129, 131 & n.4 (1987). To the contrary, *Granberry* was a habeas corpus case that has absolutely no relevance to the issue of exhaustion of tribal remedies in this civil contract dispute.

SMC also misstates the facts. First, SMC says that there is a question as to whether an official of SMC has the power to, and did, waive "the Tribe's adjudicatory authority over an action brought by Altheimer." Pet. 8. It is unclear what official SMC is referring to and to what acts it refers, for neither the official nor the acts are identified by SMC. More importantly, SMC is wrong and misstates the facts when it contends that the Tribe itself did not waive exhaustion. The Law and Order Code allows the Tribe to waive exhaustion of tribal remedies "by the Tribal Council in the same manner as it may waive sovereign immunity." Law and Order Code §2-2-104, Pet. App. 50. Section 2-2-103(3) of the Code allows the Tribal Council to waive immunity by "express resolution of the Tribal Council." Law and Order Code §2-2-103(3), Pet. App. 49. As pointed out above, SMC's Articles of Incorporation were enacted pursuant to resolution of the Tribal Coun-

cil. Pursuant to that grant of authority, SMC waived exhaustion in its Charter (Articles of Incorporation ¶4.2.2, Pet. App. 53) as well as in the Contract. Letter of Intent ¶9, Pet. App. 62-63.

In sum, the Seventh Circuit's ruling that the exhaustion rule is inapplicable to this case is fully consistent with existing caselaw, and SMC's petition for certiorari should be denied.

II.

THE SOVEREIGN IMMUNITY ISSUE PROVIDES NO GROUNDS FOR GRANTING SMC'S PETITION.

SMC's arguments concerning sovereign immunity do not provide a basis for this Court's review for the following reasons: (1) SMC has waived the immunity question; (2) not even SMC claims that the Seventh Circuit's decision creates a conflict; (3) SMC merely claims that the decision below is "erroneous," which is not a basis for certiorari review; and (4) the Seventh Circuit's decision is correct on the merits and is in line with all other federal Courts of Appeals that have addressed the issue. Finally, SMC again misstates the facts and law on this issue.

First, SMC waived the immunity issue by not raising it before the Seventh Circuit in its Petition for Rehearing and Suggestion for Rehearing En Banc.[5] Because the full Seventh Circuit was not given the opportunity to correct the alleged error in its immunity ruling, this Court should find that SMC has waived this issue. *Cf. Dean v.*

[5] In its Petition for Rehearing, SMC briefly referred to sovereign immunity in support of its arguments on exhaustion, but it did not urge the Seventh Circuit's ruling on immunity as a separate ground for rehearing.

Dean, 837 F.2d 1267, 1268 (5th Cir. 1988) (Court of Appeals will not consider claims raised for first time in a petition for rehearing); *Costo v. United States*, 922 F.2d 302 (6th Cir. 1990) (same).

Even if the issue has not been waived, SMC's sovereign immunity argument should be rejected because SMC merely contends that the Seventh Circuit's decision was erroneous. However, the function of certiorari review is not to correct erroneous decisions. *See* United States Supreme Court Rule 10.1; *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review, . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). SMC does not even attempt to point to an alleged conflict among the Circuits.[6] Indeed it cannot. As explained below, all courts that have addressed written waivers of sovereign immunity similar to the waiver in this case have found those waivers to be effective.

On the merits, SMC's and the Tribe's waivers of immunity (there are more than one) are written, express, unequivocal and effective. First, in the SMC Charter, the Tribe itself waived SMC's immunity with respect to written contracts. The Tribe's Law and Order Code specifically provides for such waivers. Section 10-4-106(1) of the Law and Order Code provides, in relevant part:

> A tribal entity is clothed by federal law with all of the privileges and immunities of the Tribe, *except as specifically limited by the tribal entity Charter*,

---

[6] In a one-sentence, conclusory paragraph, SMC says that the decision below is in conflict with the decisions of this Court and with tribal and federal law, but it never identifies the decisions that are supposedly in conflict with the Seventh Circuit's decision. Pet. 12.

> including sovereign immunity from suit in any state, federal or tribal court.

Law and Order Code, §10-4-106(1) (emphasis added), Pet. App. 51.

Pursuant to the foregoing grant of authority, the Tribe expressly waived SMC's immunity in SMC's Charter. Section 4.2.2 of the Charter provides in relevant part:

> Waiver of Sovereign Immunity of the Corporation—Contracts.
>
> Sovereign immunity of the Corporation is hereby expressly waived with respect to any written contract entered into by the Corporation. . . .

SMC Charter §4.2.2, Pet. App. 53.

All courts that have addressed a tribal ordinance similar to the quoted provision of the SMC Charter have held that the ordinance constituted an effective waiver of sovereign immunity. *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986) (collecting cases); *Snowbird Construction Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987); *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23, 28 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). Under these cases, the Tribe has effectively waived SMC's sovereign immunity, as the Seventh Circuit found. *Altheimer*, 983 F.2d at 812, Pet. App. 15.

Moreover, the Letter of Intent provides that "Buyer [SMC] and the Fort Totten Tribe of the Sioux Nation ('Tribe') will waive all sovereign immunity in regards to all contractual disputes." Letter of Intent ¶9, Pet. App. 62-63. SMC has not, and cannot, cite a single case to support the proposition that the clear and unambiguous lan-

guage of the SMC Charter and the Contract do not constitute express waivers.

SMC, in an attempt to create an issue where there is none, misstates both the law and the facts. SMC points to Section 2-2-103 of the Tribal Code to support its position, but that provision *on its face* is inapplicable to this situation. That Section states in pertinent part:

> Waiver of Sovereign Immunity. Sovereign immunity of the Tribe and any elected Tribal Council member or tribal official with respect to any action taken in an official capacity or in the exercise of the official powers of any such office, *in any action filed in the Tribal Court with respect thereto*, may be waived only by express resolution of the Tribal Council after consultation with its attorneys.

Law and Order Code §2-2-103(3), Pet. App. 49 (emphasis added). That Section by its terms applies to actions "filed in the Tribal Court," which is not the case here. The provision on immunity applicable to this case is found in Title 10 of the Law and Order Code, "Corporations and Tribal Entities." Pet. App. 50. As pointed out above, Section 10-4-106 of that Title provides that a tribal entity Charter may specifically limit sovereign immunity from suit in any state, federal or tribal court (Pet. App. 50), and the Tribe, in the SMC Charter, did just that. SMC Charter §4.2.2, Pet. App. 53.

Finally, SMC misstates the law when it quotes a federal case and suggests that the case held that "third-party beneficiary principles derived from state law can not [*sic*] be used to imply a waiver of immunity. . . ." Pet. 14, citing *Ables v. United States*, 2 Cl. Ct. 494, 499 (1983), *aff'd without op.*, 732 F.2d 166 (Fed. Cir. 1984). *Ables* had absolutely nothing to do with Indian tribes, and SMC's attempt to mislead this Court by suggesting otherwise must be rejected.

In sum, SMC has not even argued that the Seventh Circuit's decision creates a conflict among the Circuits. To the contrary, *all* of the Circuit Courts of Appeals that have addressed the sovereign immunity issue under similar circumstances have found an effective waiver. There is simply no issue for this Court to review. In any event, the issue is waived.

III.

SMC HAS PRESENTED NO GROUNDS FOR REVIEWING THE SEVENTH CIRCUIT'S RULING THAT THE CONTRACT IS NOT SUBJECT TO THE REQUIREMENTS OF 25 U.S.C. §81.

A. Introduction.

SMC argues to this Court that the Contract is covered by 25 U.S.C. §81. Yet no court has ever applied Section 81 on facts analogous to those presented by this case. The Seventh Circuit's opinion is fully consistent with existing caselaw, including *Green v. Menominee Tribe*, 233 U.S. 558 (1914).

SMC essentially makes three arguments concerning the Seventh Circuit's ruling that the Contract is not subject to 25 U.S.C. §81 because it is not a contract for services "relative to [Indian] lands." SMC argues that: (1) the Seventh Circuit's ruling conflicts with *Green v. Menominee Tribe*, 233 U.S. 558 (1914); (2) the Seventh Circuit's ruling violates 25 U.S.C. §81 (in other words, the decision is wrong); and (3) the legislative history of Section 81 does not support the Seventh Circuit's opinion. Even if each of SMC's contentions were correct (which they are not), only the first contention, alleging a conflict, provides a basis for certiorari review. *See* United States Supreme Court Rule 10.1; *Braxton v. United States*, 111 S.Ct. 1854,

1857 (1991). Nevertheless, Altheimer will address each of SMC's arguments.

B. The Seventh Circuit's Decision Is Consistent With Existing Caselaw.

This Court's decision in *Green* is clearly distinguishable from this case because of the intimate relationship of the contract in *Green* to Indian land. At issue in *Green* was an oral agreement between a tribe and an Indian trader for logging supplies used by the Indians for logging on their land. Under the agreement, the trader paid himself for the supplies from proceeds received by him from the sale of the logs. Thus the subject of the contract, logging supplies, was used to exploit a natural resource growing on Indian land. The money to pay for the supplies came from the sale of that natural resource by the trader. In essence, the contract was for the purchase of supplies in exchange for logs from Indian lands. It was thus a contract in which the Indians ceded a right or interest in Indian lands to the trader.

Green is distinguishable for a second reason. The contract in *Green* was invalid under another clause in Section 81, in addition to the "relative to their lands" clause. Section 81 prohibits contracts in consideration of services for Indians relative to "any claims growing out of . . . moneys, . . . under laws or treaties with the United States, . . . or in any way connected with or due from the United States, ..." 25 U.S.C. §81. In *Green*, the United States had granted the Indians permission to cut and sell dead timber on their land; ten percent of the proceeds was to be paid to the tribe. *Green*, 233 U.S. at 564. Thus, the money from the sale of logs belonged to the United States, ten percent of which the government paid to the Indians. Under the contract, the amounts owed for sup-

plies came out of the "first proceeds from the sale of the logs," *i.e.*, from the ten percent due to the Indians. *Id.* at 565. Thus the contract was prohibited because it concerned money "due [to the Indians] from the United States." 25 U.S.C. §81. This second provision of Section 81 is not at issue in this case and thus *Green* is distinguishable on that ground.

In addition, the policy considerations underlying *Green* distinguish it from this case, as noted by the district court in *In re United States ex rel. Hall*, 825 F. Supp. 1422 (D. Minn. 1993) (holding, *inter alia*, that 25 U.S.C. §81 did not apply to the contracts at issue because they were neither service contracts nor "relative to [Indian] lands," *Hall*, 825 F. Supp. at 1431-34, *following Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 812 (7th Cir. 1993)). In *Green*, the defendant tribe had already made payment for the logging equipment and supplies to an "Indian agent," who failed to forward the payment to the plaintiff trader. The court in *Hall* explained that the enacting Congress's concerns about non-Indians taking unfair advantage of Indian tribes in representation before Congress and in some commercial transactions were clearly implicated in *Green*. *Hall*, 825 F. Supp. at 1432 n.9. If the Court had not found the contract to be covered by Section 81, thus invalidating the contract, the Indian tribe would be forced to pay twice for the same goods. *See id.* Clearly, this factual scenario in *Green* is not at all analogous to the facts in this case, and thus the policy considerations underlying *Green* are simply not present here.

SMC's contention that the Contract in this case is like the contract in *Green* because it is inextricably tied to tribal land is wrong. In support, SMC points to the provisions in the Contract calling for architectural and engi-

neering drawings and specifications, and waste and environmental plans. Pet. 18. Yet, as pointed out above in the Nature of the Case section, there is absolutely no evidence in the record concerning the purposes of such drawings and plans. More importantly, and as discussed above, SMC neglects to mention that whatever drawings and plans were contemplated were for a manufacturing facility that was already in existence. *Altheimer & Gray*, 983 F.2d at 811, Pet. App. 14.

Finally, SMC's statement that the Contract "specifically contemplated needing approval from the Bureau of Indian Affairs of the Department of the Interior" (Pet. 18, citing Pet. App. 56) misstates the facts. In the first place, it is undisputed that representatives of SMC and the Tribe represented to the third party, Medical Supplies and Technologies, Inc. and their attorneys, Altheimer & Gray, that BIA approval of the Letter of Intent was *not* necessary. Haines Aff. ¶11, Resp. App. 5-6. Moreover, it is clear from the Contract itself that BIA approval was contemplated for the transactions *to be entered into* in the event the manufacturing venture between the parties was consummated.[7] Finally, this argument is waived because it was

---

[7] The Contract provides:

> Seller [Medical Supplies & Technology, Inc.] and Buyer [SMC] will produce and market various latex medical products . . . in facilities located on the Sioux Reservation located in Fort Totten, North Dakota. Seller and Buyer *will enter into several agreements with each other to perform certain services* in relation to the production of the Products. Seller will provide its technology, know-how and expertise . . . . Buyer will obtain all government approvals required for *these transactions*, including any approvals required by the Bureau of Indian Affairs. Buyer will also provide all working capital, investment capital, facilities and labor needed for the production of the Products and the operation of the Business. The details of these *proposed transactions* will be discussed further by Seller and Buyer and agreed to in good faith . . . .

Pet. App. 56 (emphasis added).

never raised before either the district court or the appellate court.

In short, SMC's attempts to tie this Contract to Indian land are unavailing. There is simply no conflict between the Seventh Circuit's decision and this Court's decision in *Green*.[8]

C. The Decision Below Is Correct On The Merits.

In addition to attempting to create a conflict where there is none, SMC argues that the decision below is wrong on the merits. In the first place, this is not a basis for granting certiorari review. In any event, for the reasons fully set forth by the Seventh Circuit, which need not be repeated here, this Contract is not one for services "relative to [Indian] lands" within the meaning of 25 U.S.C. §81. *Altheimer & Gray*, 983 F.2d at 810-12, Pet. App. 11-15. The Seventh Circuit correctly concluded that the Contract is not covered by Section 81 because "the Tribe did not cede any right, interest or control of Indian lands to MST [Medical Supplies & Technology, Inc.]." 983 F.2d at 812, Pet. App. 14.

Moreover, SMC seriously mischaracterizes a leading treatise in an attempt to convince this Court that the Seventh Circuit's opinion is in error. SMC states that from the first days of this nation, federal policy has been to respect the sovereignty of Indian tribes, including tribal property, and that this policy "has been necessary for the survival of the Indian tribes and their way of life." Pet. 14. For these propositions, SMC cites F. Cohen, *Handbook of Federal Indian Law* 509 (1982 ed.) ("Cohen

[8] SMC does not contend that there is a conflict with any other decision.

treatise"). SMC then asserts that "[p]rimary among these protections are the requirements embodied in 25 U.S.C. §81." Pet. 14. However, the cited page of the Cohen treatise says *nothing* about 25 U.S.C. §81 at all. Rather, the cited page and the surrounding text addresses only the federal policy against alienation of Indian property and explains that the justifications offered for that policy were complex and evolved from a means for avoiding war with Indian tribes to the current policy of "cultural preservation." F. Cohen, *Handbook of Federal Indian Law* 508-10.

In addition, SMC fails to inform this Court that the Cohen treatise, far from characterizing Section 81 as an attempt to promote "the survival of the Indian tribes and their way of life" (Pet. 14), in fact characterizes Section 81 as just the opposite. At the page cited by SMC at note 7 of its Petition, the Cohen treatise specifically cites 25 U.S.C. §81 as an example of "extensive government supervisory power over the everyday life of Indians [that] was essentially unchecked" and which was part of "*a systematic attempt to eradicate Indian heritage and tribalism.*" F. Cohen, *Handbook of Federal Indian Law* 143, cited at Pet. 16 n.7 (emphasis added). In short, SMC's attempt to buttress its arguments by citing to the Cohen treatise are misguided, at best, and at worst, a deliberate attempt to mislead this Court concerning the historical background of and policies underlying 25 U.S.C. §81.

D. The Historical Context And Legislative History Support The Seventh Circuit's Decision.

Finally, SMC argues that the legislative history of Section 81 does not support the Seventh Circuit's opinion. In the first place, even if true, this is not a ground for granting certiorari review. In any event, the fact is that there is nothing in the legislative history that directly ad-

dresses the "relative to their lands" provision. Indisputedly, this qualifier means that Section 81 does not apply to *all* contracts between Indian tribes and non-Indians, but only to certain contracts—those for services which are relative to Indian lands.

The historical backdrop of the statute indicates that what Congress was concerned with were contracts that gave non-Indians some measure of control over Indian lands. In *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), which addressed Section 81, the Seventh Circuit considered the longstanding federal policy of regulating transactions *in* Indian land. *Id.* at 618. Colonial legislatures restrained private land *purchases* from Indians and required all *acquisitions* of Indian land to be approved in advance. *Id.*, *citing* F. Cohen, *Handbook of Federal Indian Law* 508 (1982 ed.). After the War of Independence, the government continued this policy of restraining alienation of land "in order to avoid war with the Indian tribes." *Id.* The Seventh Circuit was thus correct in "hold[ing] that Congress intended to continue its policy of regulating all transactions *in Indian land* when it enacted Section 81 in 1872." *Id.* (emphasis added). Following the principles articulated in *Koberstein*, the Seventh Circuit was correct in this case in holding that the Contract is not subject to Section 81 because the Contract does not cede any right, interest or control over Indian lands to non-Indians.

The legislative history of Section 81, though limited, also supports the Seventh Circuit's holding in this case. See Cong. Globe, 41st Cong., 3d Sess. 1483-87. Although the legislative history does not address the phrase "relative to their lands," it is clear that the Congress did not intend that Section 81 cover *all* contracts with Indians. Rather, the purpose of Section 81 was to protect Indian

rights *in* their lands. One of the statute's proponents stated that the purpose was "to see that [the Indians] get their *rights* promptly and fully and in the sense of the highest equities in regard to these three subjects: first, *their lands*; . . . ." *Id.* at 1487 (Sen. Casserly) (emphasis added).[9]

SMC's suggestion that Section 81 applies here because Altheimer & Gray are attorneys is unsupportable. First, Congress was concerned with agreements *between* Indian tribes and attorneys; in this case, Altheimer & Gray were not the Tribe's attorneys. Second, Congress was concerned not with *all* agreements with attorneys for the payment of money for their services, but only with agreements with attorneys and others for services *"relative to* [*Indian*] *lands."* 25 U.S.C. §81 (emphasis added). In this case, there is no connection between the Contract and any rights of the Tribe to the land. The only connection to land at all is that the manufacturing facility happened to be on Indian land. But, as the Seventh Circuit concluded, the Contract could have been performed anywhere and it did not cede any right, interest or even control over the land to a non-Indian.

IV.

A CONTRARY RESULT WILL SIGNIFICANTLY IMPAIR INDIAN ECONOMIC INDEPENDENCE AS WELL AS OPEN THE FEDERAL COURTS TO A BARRAGE OF LAWSUITS.

A decision adopting SMC's limitless interpretation of Section 81 would seriously impair Indian economic inde-

---

[9] The other two subjects noted by Senator Casserly were the Indian tribes' treaties with the United States and their annuities from the United States (Cong. Globe, 41st Cong., 3d Sess. 1487), which are not involved in this case.

pendence, "the foundation of a tribe's self-determination." *Altheimer & Gray*, 983 F.2d at 815, Pet. App. 20. Under SMC's expansive interpretation, *every contract* between a tribe and a supplier of goods or services to be used, consumed, or provided on Indian land is subject to the requirements of Section 81. That includes, for example, every contract for the purchase of food, clothes, and other consumer goods by a tribe, and every employment contract with a tribe (including at-will employment contracts) in which services are to be rendered on Indian land. This is the inescapable result of SMC's interpretation, for its interpretation admits of no limitations; any contract having *any* relation to Indian land, no matter how remote, is subject to Section 81. Clearly, this was not the Congressional intent. Just as clearly, if SMC's interpretation is adopted, non-Indians will simply cease to do business with Indian tribes.

An equally undesirable result of SMC's interpretation arises from the following provision of Section 81:

> All contracts or agreements made in violation of this section [Section 81] shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy, and one-half thereof shall be paid to the person suing for the same and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 U.S.C. §81. Under this statute, if a contract required government approval and it was not obtained, it appears that anyone (not necessarily an Indian) may sue to recover

"all money or other thing of value" paid by any Indian or tribe to the other contracting party. *But see In re United States ex rel. Hall*, 825 F. Supp. 1422 (D. Minn 1993) (dismissing action brought under Section 81 for rescission and recovery of monies on grounds of lack of standing). The statute expressly provides for federal jurisdiction, regardless of the amount in controversy. Moreover, there is a real incentive to bring such cases, since the plaintiff, if successful, "shall be paid" one half of any recovery.

Most significantly, neither the statute nor any caselaw provides for a statute of limitations or repose on such actions. Therefore, under SMC's expansive interpretation, not only would countless contracts with Indian tribes be rendered null and void, but also, anyone may sue in federal court to recover whatever the tribe parted with pursuant to those contracts, no matter how long ago the contract was executed. This provision has been invoked in recent years, *United States ex rel. Buxbom v. Naegele Outdoor Advertising Co. of California, Inc.*, 739 F.2d 473 (9th Cir. 1984), although the court ruled in that case against the plaintiff because the contract had been approved retroactively by the Bureau of Indian Affairs. Given the potential rewards to individual plaintiffs, it is not fanciful to predict that thousands of lawsuits will be filed across the country to recover monies under Section 81, should SMC's interpretation prevail in this Court.

The magnitude of claims as to which SMC's interpretation of Section 81 would open the floodgates is difficult to overstate. For example, every order placed by SMC over the years for machinery, spare parts, electricity, stationary, papers and pencils, food for its cafeteria, or toilet paper for its washrooms would be subject to a suit for recoupment in federal court if SMC is correct in its inter-

pretation of Section 81 and governmental approval for those transactions was not obtained.

In this case, the floodgates argument is not far-fetched. Indeed, in a very recent case criticized by SMC (Pet. 21 n.11), numerous individual plaintiffs brought suit under Section 81 to invalidate contracts for goods and services entered into between various Indian tribes and non-Indian merchants and vendors. *In re United States ex rel. Hall*, 825 F. Supp. 1422 (D. Minn. 1993). The contracts were connected to the tribes' operation of casinos and other gaming enterprises. The plaintiffs were not parties to the contracts, and none of the contracting parties challenged the contracts. The plaintiffs sought rescission and refund of all monies paid by the Indian tribes to defendant merchants pursuant to the contracts. *Id.* at 1425. The court noted that under Section 81, the plaintiffs, if successful, would receive one-half of the refunded monies. *Id.*

The court in *Hall* correctly dismissed the action on the merits of plaintiffs' Section 81 claim. (The court also dismissed the action for lack of standing and failure to join indispensable parties.) The court held that the contracts were not covered by Section 81 on the grounds that Section 81 covers only contracts for services, not supplies, and that the contracts were not for services "relative to [Indian] lands." *Id.* at 1430-34, *following Altheimer & Gray*, 983 F.2d 803 (7th Cir. 1993).

Since SMC criticizes the *Hall* decision, its position must be that, first, every single contract entered into by a tribe for goods or services to be used, consumed or rendered on Indian land is subject to Section 81 and, second, *anyone* may bring an action under Section 81 to challenge those contracts. Certainly, non-Indians will not do business with Indian tribes if they can reasonably anticipate that

anyone, not even a party to the contract, may challenge the transaction in court, whether or not the suit is ultimately successful. Businesses enter into contracts to make a profit, not to buy a lawsuit.

In sum, in determining what contracts are "relative to their lands," some line must be drawn. The line affirmed by the Seventh Circuit in this case (previously drawn in *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985)) fulfills the Congressional intent, prevents the absurd results set out above, preserves the ability of tribes to do business with non-Indians, and is fully consistent with other decisions. The Seventh Circuit correctly rejected SMC's limitless interpretation of Section 81.

CONCLUSION

For the foregoing reasons, SMC's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL S. HEFTER
Counsel of Record
MAUREEN A. GORMAN
CAROLINE K. VICKREY
HEFTER & RADKE
333 West Wacker Drive
Suite 2810
Chicago, Illinois 60606
(312) 444-9292
Counsel for Respondent

November 10, 1993

RESPONDENT'S APPENDIX

TABLE OF CONTENTS

	RESP. APP. PAGE
SIOUX MANUFACTURING CORPORATION'S STATEMENT OF UNDISPUTED MATERIAL FACTS	1
AFFIDAVIT OF MARTHA MAHAN HAINES ..	3
DEVILS LAKE SIOUX TRIBE RESOLUTION NO. A05-89-191	8

[Dated August 19, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALTHEIMER & GRAY,	)	No. 91 C-3496
	)	Judge
Plaintiffs,	)	Suzanne B. Conlon
vs.	)	
	)	
SIOUX MANUFACTURING CORPORATION,	)	Magistrate
	)	Bernard Weisberg
Defendant.	)	
	)	
	)	
HEALTH CARE SERVICES, LTD., an Illinois corporation, and JOHN VELERIS,	)	No. 91 C-3653
	)	Judge
	)	Suzanne B. Conlon
Plaintiffs,	)	
vs.	)	
	)	Magistrate
SIOUX MANUFACTURING CORPORATION, a tribal corporation,	)	Bernard Weisberg
	)	
	)	
Defendant.	)	
	)	

SIOUX MANUFACTURING CORPORATION'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant, Sioux Manufacturing Corporation (SMC) submits pursuant to general Rule 12 of the Northern District of Illinois, its statement of undisputed material facts as follows:

* * * *

5. SMC operates only one manufacturing facility which is situated in Fort Totten, on Reservation land held in trust for the Tribe by the United States. SMC's corporate offices are located exclusively within the manufacturing facility. Aff. of McKay, ¶5.

* * * *

15. In 1990, SMC's gross sales of items manufactured on the Reservation totalled approximately $25 Million Dollars. Aff. of McKay, ¶7.

* * * *

Dated this 19th day of August, 1991.

Respectfully submitted,

/s/ Robert Vaaler
ROBERT VAALER

/s/ Allen J. Flaten
ALLEN J. FLATEN
Vaaler, Warcup, Woutat, Zimney
& Foster (Chartered)
5th Floor - Metropolitan Bldg.
600 DeMers Avenue, P.O. Box 1617
Grand Forks, ND 58206-1617
Telephone: (701) 772-8111
Fax: (701) 772-7328
Attorneys for SMC

Donald B. Jurenberg
John Y.E. Lee
Altheimer, Wolff & Donnelly
2 Illinois Center
233 North Michigan Avenue
Suite 2400
Chicago, IL 60601
Telephone: (312) 819-4670

[Dated September 20, 1991]

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALTHEIMER & GRAY, a partnership, Plaintiff, vs. SIOUX MANUFACTURING CORPORATION, Defendant.	)	No. 91 C 3496 Consolidated with No. 91 C 3653 Judge Suzanne B. Conlon
HEALTH CARE SERVICES, LTD., an Illinois corporation, and JOHN VELERIS, Plaintiffs, vs. SIOUX MANUFACTURING CORPORATION, a tribal corporation, Defendant.	)	Magistrate Judge Bernard Weisberg

AFFIDAVIT OF MARTHA MAHAN HAINES

Martha Mahan Haines, being first duly sworn upon oath, states as follows:

1. I have personal knowledge of the facts contained in this affidavit and could competently testify thereto if called as a witness.

2. I am, and at all relevant times have been, an attorney licensed to practice law in the State of Illinois and a partner in the law firm of Altheimer & Gray. I was the lead attorney for Medical Supplies and Technology, Inc. (an Illinois corporation) and its two principals, John Veleris (an Illinois resident) and Thomas Klamet (an Ohio resident), in connection with the negotiations and agreement with Sioux Manufacturing Corporation ("SMC") which are the subject of this action.

3. The March 7 letter agreement, a copy of which is attached to the Complaint filed by Altheimer & Gray in this case, was negotiated among the parties in a series of meetings in January, February and March, 1990, all of which took place in Chicago, Illinois, and in telephone calls between the attorneys for both parties. Representatives of each party were present at the negotiations, along with counsel for each party.

4. Mark Jacobs, an attorney practicing in the State of Illinois, represented SMC at every one of the negotiating sessions.

5. The parties met to conduct their initial negotiations on January 4, 1990 in Chicago, Illinois. John Veleris, James Carroll, a partner in the law [sic] of Altheimer & Gray, and I were present at those negotiations. Robert Manning, the vice president and general manager of SMC, and Mark Jacobs participated in the negotiations on behalf of SMC.

6. On February 3, 1990, all of the above-named persons present at the January negotiations met again in Chicago, Illinois and continued their negotiations.

7. On February 14, 1990, the parties and their representatives met again in Chicago, Illinois to further negotiate an agreement between them.

8. On February 16, 1990, representatives of and attorneys for the parties met again in Chicago, Illinois and conducted further negotiations.

9. On February 28, 1990, I met with Carroll and Jacobs to continue negotiations on the terms of the parties' proposed letter agreement.

10. On March 7, 1990, Veleris, Carroll and I met with Manning, Jacobs, Terry Johnson, the Treasurer and Controller of SMC, and Carl McKay, the President and Board Chairman of SMC and Chairman of the Devil's Lake Sioux Tribal Council. The negotiations on March 7, 1990 culminated in the execution on that date of the letter agreement which is the subject of this case, a copy of which is attached as Exhibit A to Altheimer & Gray's Complaint. That agreement, as executed, incorporates language jointly drafted by both parties and their counsel.

11. Among the subjects discussed at the negotiations was the amenability of SMC to suit with regard to this matter should the need arise. The following were discussed with respect to that subject:

> (a) The participants in the negotiations discussed the fact that, should they eventually succeed in negotiating a business arrangement along the lines discussed in the March 7 letter agreement, federal government approval of the contract or contracts reflecting that agreement might be required. They therefore agreed that SMC would seek such approval, and language to that effect was included in the March 7 letter agreement. Mark Jacobs, counsel for SMC, stated, however, that no such approval was necessary for the March 7 letter agreement, and no one present disagreed with that statement.

(b) The participants in the negotiations discussed the fact that, should a suit against SMC be necessary either under the March 7 letter agreement or under any subsequent agreement, the parties bringing the suit would be unwilling to pursue the matter in the Tribal Court of the Devil's Lake Sioux Tribe. Robert Manning, one of SMC's representatives, said that SMC understood the need for it to submit to suit in Illinois, and stated that SMC was in fact amenable to suit in Illinois. No one present disagreed with that statement, including SMC's counsel. SMC agreed that any suit against it under the March 7 letter agreement or any subsequent agreements could proceed in the state or federal courts in Illinois rather than in the Tribal Court, and that Illinois law would be applicable. Language to that effect was therefore included in Paragraph 9 of the March 7 letter agreement.

(c) The participants in the negotiations discussed the fact that a waiver of SMC's sovereign immunity might be necessary to permit any suit to enforce both the March 7 letter agreement and any subsequent agreements. The representatives of SMC said that SMC was in fact amenable to suit under the agreements. No one present, including SMC's counsel, disagreed. SMC agreed to reiterate in the March 7 letter agreement the waiver of sovereign immunity for suits under the March 7 letter agreement and any subsequent agreements, and language to that effect was therefore included in Paragraph 9 of the March 7 letter agreement.

12. Both signatures on the March 7 letter agreement were placed thereon in my presence in Altheimer & Gray's conference room at 10 South Wacker Drive in Chi-

cago, Illinois, on March 7, 1990. John Veleris signed for Medical Supplies and Technologies, Inc. and Robert Manning signed for SMC. I personally observed both men place their signatures on the document; Carl McKay had left and was not present when the document was signed.

* * * *

/s/ Martha Mahan Haines
MARTHA MAHAN HAINES

SUBSCRIBED and SWORN to
before me this 20th day of
September, 1991.

/s/ Gail Ann Keis
Notary Public
My commission expires 10-4-92

DEVILS LAKE SIOUX TRIBE
Resolution No. A05-89-191

WHEREAS, the Devils Lake Sioux Tribe of Indians is a federally recognized Indian Tribe acting under a revised Constitution, dated May 5, 1960, approved by the Acting Commissioner, Bureau of Indian Affairs, July 14, 1961, and as subsequently amended; and

WHEREAS, the Devils Lake Sioux Manufacturing Corporation ("DLSMC") is a corporate entity chartered under the laws of the State of North Dakota and owned 51% by the Tribe and 49% by the Brunswick Corporation; and

WHEREAS, DLSMC is an Indian manufacturing entity with its sole office on the Reservation and is the chief source of tribal income and employment; and

WHEREAS, extended negotiations between the Tribe and Brunswick have resulted in an agreement whereby the Tribe will reorganize DLSMC as a 100% tribally-owned and tribally-chartered corporation through a loan to DLSMC from the State Street Bank of Boston;

NOW THEREFORE BE IT RESOLVED, that the Tribal Council hereby adopts the Articles of Incorporation of the Sioux Manufacturing Corporation dated September 15, 1989, as attached to this Resolution.

BE IT FURTHER RESOLVED that the Tribal Council shall have the authority to pledge the share of stock issued by the Corporation pursuant to Subsection 7.18 as security for a loan to the Corporation.

CERTIFICATION

I, the undersigned, as Secretary-Treasurer of the Devils Lake Sioux Tribal Council, do hereby certify that the Tribal Council is composed of six members of whom six were present, consisting of a quorum for a Special Meeting, which was duly called and convened this 18th day of September, 1989, and approved this Resolution A05-89-191 by an affirmative vote of 3 in favor, 0 opposing, 1 absent.

(The Secretary-Treasurer does not vote and the Chairman votes only in case of ties.)

/s/ Ardis J. Shaw
Ardis J. Shaw, Secretary-Treasurer

/s/ Carl R. McKay
Carl R. McKay, Tribal Chairman